



ONTARIO  
SUPERIOR COURT OF JUSTICE

Electronically issued  
Délivré par voie électronique : 23-Jun-2020  
Toronto



Plaintiff

– and –

FSB GROUP LTD., FSB INSURANCE LTD. AND FSB COMMERCIAL LTD.

Defendants

Proceeding commenced under the Class Proceedings Act, 1992

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY

**LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.**

**IF YOU PAY THE PLAINTIFF'S CLAIM, and \$10,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and \$400 for the costs and have the costs assessed by the court.**

**TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.**

**Date:**

**Issued by: \_\_\_\_\_  
Local Registrar**

**Address of Court Office:  
393 University Avenue  
Toronto, ON M5G 1E6**

**To: FSB Group Ltd., FSB Insurance Ltd. and FSB Commercial Ltd.  
160 Drumlin Circle  
Concord, ON  
L4K 3E5**

## RELIEF CLAIMED

1. The Proposed Representative Plaintiff claims the following on his behalf, and on behalf of members of the Class:

- a) an order certifying this action as a class proceeding and appointing [REDACTED] [REDACTED] as Representative Plaintiff of the Class;
- b) a declaration that the members of the Class were employees during their work as insurance employees with the defendants and thus are entitled to the employment standards under the Employment Standards Act, 2000, S.O. 2000, c. 41 (“ESA”);
- c) a declaration that the Defendants are jointly liable for the unpaid wages of the Class Members;
- d) a declaration that the Defendants were unjustly enriched by failing to pay the class members their entitlements pursuant to the ESA;
- e) the sum of \$10,000,000.00 as general damages representing the losses of the Class;
- f) the sum of \$10,000,000 as punitive damages for the reprehensible conduct of deliberately misclassifying the workers and violating the ESA;
- g) a declaration that the Defendants violated the terms of the ESA by:
  - (i) failing to ensure that Class Members were properly classified as employees;

- (ii) failing to advise class members of their entitlement to compensation equal to or above the minimum wage as provided by the ESA (the “Minimum Wage”);
- (iii) failing to advise Class members of their entitlement to overtime pay for hours worked in excess of 44 hours per week in accordance with the ESA or of the applicable provincial employment standards act (the “Overtime Threshold”);
- (iv) requiring and/or permitting the Class Members to work overtime hours and failing to compensate the Class Members for hours worked in excess of the Overtime Threshold (“Overtime Pay”);
- (v) failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
- (vi) failing to advise Class Members of their entitlement to vacation pay at a rate of 4 percent or 6 percent of wages, as the case may be, in accordance with the ESA (“Vacation Pay”);
- (vii) failing to compensate Class Members for Vacation Pay;
- (viii) failing to advise Class Members of their entitlement to public holiday pay and premium pay in accordance with the ESA (the “Public Holiday and Premium Pay”);

- (ix) failing to compensate Class Members for Public Holiday and Premium Pay; and
  - (x) failing to monitor and record or otherwise track the Class Members hours of work.
- 
- h) damages for compensation below Minimum Wage;
  - i) damages for unpaid Overtime;
  - j) damages for unpaid Vacation Pay;
  - k) damages for unpaid Public Holiday and Premium Pay;
  - l) damages for unpaid Termination Pay for employees terminated without notice;
  - m) damages for unpaid Severance Pay for employees with more than five years of service who were terminated;
  - n) a declaration that Clause 10.3 of the “Producer Agreement” that the Defendants required the Plaintiff to sign, agreeing to indemnify the defendants if the Plaintiff is found to be an employee, is void as a reprisal contrary to s. 74(1) of the ESA;
  - o) a declaration that the Defendants are liable for any consequential damages resulting from the determination that the Class Members are/were employees of the Defendants and not independent contractors;

- p) a declaration that the Defendants are liable for any adverse tax liability sustained by the Class Members resulting from a determination that the Class Members are/were employees of the Defendants and not independent contractors;
- q) a declaration that the Defendants are liable, and must reimburse the Class Members, for any Canada Pension Plan, RSC, 1985, c C-8 (“CPP”) or Employment Insurance Act, SC 1996, c 23 (“EI”) contributions which may have been paid or are owed resulting from a determination that the Class Members are/were employees of VIB not independent contractors;
- r) an order, pursuant to s. 24 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (“Class Proceedings Act”) directing an aggregate assessment of damages;
- s) an order directing the Defendants to preserve and disclose to the Plaintiff all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;
- t) prejudgment interest in accordance with section 128 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- u) postjudgment interest in accordance with section 129 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended;
- v) the costs of this action on a substantial indemnity basis, together with applicable HST, or other applicable taxes, thereon;

w) the costs of administering the plan of distribution of the recovery in this action;  
and,

x) such further and other relief as this Honourable Court may deem just.

## BACKGROUND

2. FSB Group Ltd., FSB Insurance Ltd. and FSB Commercial Ltd. (together, “FSB”) are related corporations incorporated under the Business Corporations Act, R.S.O. 1990. FSB sells a wide range of insurance products, including life, home, business and casualty insurance.

3. FSB’s business model involves employing insurance representatives, referred to as Producers, who are paid entirely by variable compensation and required to sign contracts stating that they are independent contractors and not employees.

4. [REDACTED] is an individual residing in the Province of Ontario. [REDACTED] worked as a Producer with FSB from on or about June 24, 2019 to on or about January 20, 2020.

5. This class action is brought because [REDACTED], and other variable compensation employees working for the Defendant, were systemically misclassified as independent contractors and denied the minimum standards to which they were entitled under the ESA.

## THE DEFENDANTS, WILFULLY AND IN VIOLATION OF THE ESA, MISCLASSIFIED EMPLOYEES AS INDEPENDENT CONTRACTORS

6. [REDACTED] was offered employment on June 20, 2019 by way of letter from Natalie Ramos-Duenas holding the title of “Human Resources Representative”. The covering

letter confirms [REDACTED]'s offer of employment. This letter specifically states that "your employment will be governed by the terms of those policies".

7. Notwithstanding the covering letter, FSB then immediately provided [REDACTED] with a contract labeled as an independent contractor agreement. [REDACTED], and other variable compensation workers of the Defendants were required to sign a contract labelled a Producer Agreement.

8. Contrary to the covering letter, Clause 10.1 of the Producer Agreement required the workers to acknowledge that they were "retained as an independent contractor and not as an employee of FSB".

9. [REDACTED] was issued both T4A and T4 Canada Revenue Agency information slips. The item included on the T4 is Box 85, which the Canada Revenue Agency refers to as "Employee-paid premiums for private health service plan".

10. Contrary to the stated intention in Clause 10.1 that the worker would be an independent contractor, FSB treated the workers as employees. Requirements in the Producer Agreement itself clarified that FSB and its workers would be engaged in a master-servant relationship. The most relevant facts that point to the fact that [REDACTED] was an employee of FSB are the following:

- a) [REDACTED] was required to sell insurance from FSB's office, under supervision of FSB managers, and by following policies set out by FSB.



- b) All the tools were provided by FSB, and the workers were not in business for themselves with a chance of making a profit above their variable compensation earnings.
- c) The employees were only allowed to sell lines of insurance provided by FSB, and no other type of insurance; and they were not permitted to engage in any other employment or business other than that of FSB, even if it was not related to insurance.
- d) Clause 2.3 of the Producer Agreement stated that “FSB shall provide the Contractor, at FSB's costs, an equipped office and/or workstation and all staff services (including office equipment such as a land line or office telephone) as may be required....”
- e) Clause 3.1 of the Producer Agreement stated that “The contractor shall devote his full working time, effort and attention to the service of FSB.... During the term of this agreement, the Contractor will not engage in any employment, and he will not represent, directly or indirectly, any other insurance brokerage or insurance company that may be in a business similar to that of FSB. Passive and personal investments shall not be prohibited under this agreement to the extent they do not constitute a conflict of interest or are competitive with FSB's business...”
- f) Clause 3.11 of the Producer Agreement required the worker to “submit all leads to FSB exclusively,” and not subcontract any services.

11. Clause 10.3 of the Producer Agreement anticipated that a worker might become aware that he or she was an employee. It attempted to intimidate them against making such complaints by stating that “in the event that the Contractor is classified or adjudicated by a court or taxing authority or any statutory body, as an employee of FSB, then the Contractor shall indemnify and save harmless FSB of and from any and all claims and demands which may be made against FSB by Canada Revenue Agency (or any other taxing authority or government body)”.

#### APPLICATION OF STATUTORY ENTITLEMENTS

12. Under the ESA employees must be paid additional Public Holiday Pay above and beyond their regular pay as per sections 24-32. As per s. 24(1) of the ESA, for employees with variable compensation this pay is to be an average of what they made over the preceding 20 days.

13. Under the ESA employees must be paid additional Vacation Pay above and beyond their regular pay, as per s. 35.2. This pay must be at least 4 per cent of the wages earned by the employee for those with less than five years seniority and 6 per cent for those with greater than five years seniority.

14. All vacation pay that has previously accrued remains owing to an employee, as per s. 38 of the ESA.

15. When an employee’s employment ends, “the employer shall pay any wages to which the employee is entitled,” as per s. 11(5) of the ESA.

16. Pursuant to s. 22(1) of the ESA, an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week.

17. In the ESA, wages are defined to include variable compensation.

18. As per s. 5(1) of the ESA, no employee may opt out of a benefit of the ESA unless the employee receives a greater benefit.

19. ██████████ pleads that as per s. 15.1 of the ESA, the Defendants were required to keep detailed records of his vacation pay, but he was not provided any such records and was not aware of any such records existing.

20. The Defendants' compensation plan did not provide for Public Holiday Pay or Vacation Pay computed as a percentage of an employee's total wage. The policy therefore violates the ESA and the employees are owed additional compensation throughout their employment.

21. As per s. 40(1) and (2) of the ESA, the Vacation Pay that ought to have been paid has a trust over it and creates a lien upon the assets of the employer in the amount of the monies that ought to have been paid.

#### Employees Systemically Denied Overtime Pay

22. The Plaintiff pleads that he often worked overtime in excess of 44 hours per week, and was not compensated by overtime pay.

23. The Defendant had a systemic policy of requiring employees to work additional hours to meet sales targets that could often only be achieved by working in excess of 44 hours per week.

24. The Defendant knew or ought to have known that employees were working overtime, as they were required to file reports about the number of client visits that they made.

25. The Defendant avoided or disregarded its overtime obligations at a systemic level: It had no written policies or directives; no printed information for employees; no standardized systems or centralized record-keeping.

26. The Defendant had a systemic policy of never paying overtime premium pay to its employees. There was never any information provided by the Defendant to its employees suggesting that they could ask for overtime pay.

27. There is no mention of the possibility of overtime pay in the Compensation Plan document provided by the Defendant to its employees.

28. The Plaintiff pleads that the compensation policy of the Defendant placed a particular premium on top performance. In order to earn more than minimal incentive pay, he had to work in excess of 44 hours per week.

29. As per s. 22 (1) of the ESA, an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week.

30. The regular rate is to be calculated by dividing the total earnings including base salary and incentive pay and dividing by the number of hours worked.

#### DISGORGEMENT OF PROFITS

31. The Defendant is in a fiduciary position to their employees it places with its client firms. The Class Members relied on the Defendant to properly classify and pay them according to employment standards.

32. The Defendant has not lived up to that fiduciary position by placing their own interest in profit over that of the workers that they place.

33. Thus, any profits made through this breach of fiduciary duty ought to be disgorged.

34. The Defendant benefited by misclassifying the Class Members as contractors and thus gained profits which it re-invested or otherwise benefit from. The Defendant ought to disgorge to the Class Members the profits obtained from breaching the ESA.

#### **SYSTEMIC BREACH OF THE ESA**

35. The Defendant has systematically breached the provisions of the ESA with respect to all Class Members by:

- a) failing to ensure that all Class Members were properly classified as employees;
- b) failing to ensure that the Class Members' hours of work were monitored and accurately recorded;
- c) requiring and/or permitting the Class Members to work hours in excess of the Overtime Threshold but failing to ensure that the Class Members were compensated for Overtime Pay;
- d) failing to compensate Class Members for Vacation Pay; and,
- e) failing to compensate Class Members for Public Holiday and Premium Pay.

36. The Defendant's misclassification of the Class Members as purported independent contractors and the denial of their entitlements under the ESA or applicable employment standards act is unlawful.

37. To the extent that any contracts purport to designate the Class Members as independent contractors, such contracts or provisions are void and unenforceable as attempts to contract out of the ESA, contrary to section 5 of the ESA.

38. The Class Members are entitled to unpaid wages.

39. The corporate defendant's Directors are personally liable to the Class Members for unpaid wages pursuant to sections 80 and 81 of the ESA, and section 113 of the Ontario Business Corporations Act, RSO 1990 c B 16.

40. Such breaches have been and are ongoing and continuous in respect of the Class Members since the firm was incorporated.

#### **AGGREGATE DAMAGES**

41. The Plaintiff also pleads that the trial judge ought to make an award of aggregate damages in this case since the records kept by the Defendant of the time worked by Class Members should allow for the damages of each Class Member to be calculated without the need for resort to individual assessments or mini-trials.

#### **PUNITIVE, AGGRAVATED AND/OR MORAL DAMAGES**

42. The Plaintiff pleads that this case is appropriate for Punitive, Moral and/or Aggravated damages. Additional non-exclusive reasons for these damages are set out below:

- a) The Defendant misclassified their workers contrary to the ESA which is an act directly contrary to the ESA;
- b) The Defendant failed in their statutory duties including but not limited to collecting government taxes and payroll taxes;
- c) The Defendant failed to provide minimum employment standards relating to their employees, thus breaching the ESA and disadvantaging their employees;
- d) The Defendant benefited from their employees being forced to work overtime which constitutes illegal wage shortchanging from said employees contrary to the ESA for which there ought to be more of a punishment than to merely pay the money which was initially owed;
- e) The Defendant acted in a callous manner by not resolving the issue once they learned of it but instead attempting to not pay back-wages to those employees affected;
- f) The Defendant has failed and continues to fail to provide the statutory benefits to employees including up to and at any final hearing of this matter;
- g) The Defendant exploited employees who were looking for positions and/or jobs and forced them to work as contractors when they were vulnerable; and,
- h) By misclassifying these workers as not being employees the Defendant has eliminated many non-monetary rights from the workers including but not limited to:

- (i) Part VII of the ESA: Hours of Work and Eating Periods;
  - (ii) Part VII.1 of the ESA: Three Hour Rule;
  - (iii) Part XIII of the ESA: Benefit Plans;
  - (iv) Part XIV of the ESA: Leaves of Absences;
- i) The Defendant to date has ignored Employment Law by classifying their workers as contractors, ignoring provisions of the ESA notwithstanding that these were put in place to provide protection against their very business model and thus extra damages over and above the amount they short-changed their employees for is required for behavior modification of other companies.
- j) That by misclassifying their workers the Defendant was put in a superior business position over their competitors who correctly classified their workers as employees.

### **The Class**

43. This action is brought on behalf of a class of persons, defined as:

All workers at FSB GROUP LTD., FSB INSURANCE LTD. AND FSB COMMERCIAL LTD. and who have not filed a complaint pursuant to s. 96 of the ESA. who were either:

A) Variable compensation workers underpaid their statutory benefits; or,



B) Were classified as independent contractors and thus were not paid the statutory obligations under the Employment Standards Act (Ontario) and other legislation;

44. The information about who are the members of the class is within the knowledge of the Defendants.

45. [REDACTED] seeks to have the class time period run from the date of incorporation of the Defendants until the date the notice is sent to the class after certification.

#### LOCATION

46. [REDACTED] proposes this action be tried at the City of Toronto, in the Province of Ontario.

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Lawyers for the Plaintiff

 v. FSB GROUP LTD. et al  
Plaintiff Defendants

ONTARIO  
SUPERIOR COURT OF JUSTICE  
Proceeding under the Class  
Proceedings Act, 1992  
Proceeding commenced at TORONTO

STATEMENT OF CLAIM

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